Supreme Court, U.S.
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No. 04-455

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In The Supreme Court of the United States

TIMOTHY DARYL MORSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Defendant is charged with a violation of 18 U.S.C. §922(g)(9) – possession of a firearm after having been convicted of a misdemeanor involving domestic violence – and that statute was not enacted until two years after the predicate crime was committed, does the Due Process Clause, under the logic of Staples v. United States, 511 U.S. 600 (1994), require that the government prove that the Defendant knew that he was not permitted to carry a firearm?

2. Are the United States Sentencing Guidelines constitutional?

3. Is 18 U.S.C. §922(g)(9) unconstitutional under the Commerce Clause of the U.S. Constitution?

4. Is 18 U.S.C. §922(g)(9) unconstitutional as a violation of the Ninth and Tenth Amendments to the U.S. Constitution?

5. Is 18 U.S.C. §922(g)(9) unconstitutional as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U. S. Constitution?

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JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is taken following a May 18, 2004, decision of the United States Circuit Court of Appeals for the Fourth Circuit. The appellate jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE TO BE CONSTRUED

18 U.S.C. §922(g)(9) reads, in pertinent part:

> It shall be unlawful for any person –
>
> > (9) who has been convicted in any court of a misdemeanor crime of domestic violence;
>
> to ... possess in or affecting commerce, any firearm or ammunition.

STATEMENT OF THE CASE

Timothy Daryl Morse was charged with knowingly possessing a firearm and ammunition after being convicted of a misdemeanor domestic violence offense in violation of 18 U.S.C. §922(g)(9). Mr. Morse had been convicted of a misdemeanor domestic violence offense in 1994, two years before the passage of what is now 18 U.S.C. §922(g)(9). The

misdemeanor domestic violence predicate offense had claimed that he had struck Shondail Brown, a woman with whom he allegedly had had a child. At the time, both he and Ms. Brown thought that Mr. Morse was the father of her child, but later DNA tests showed that he is not. Mr. Morse was found guilty of committing a domestic assault and battery. At no time did Mr. Morse ever receive any notice that he was not permitted to possess a firearm.

In late 2001 or early 2002, a friend had brought a handgun to Mr. Morse's house and had left it there by accident. Mr. Morse put it in a safe until his friend came back to retrieve the gun. On July 7, 2002, some neighbors, Waylon and Chad Nixon, beat up Mr. Morse and Mr. Morse's friend Lorenzo Hayden. Mr. Morse was scared of his neighbor, so he retrieved the gun from his safe and carried it with him that week. On July 12, 2002, he and Mr. Hayden were driving in Mr. Morse's car when they saw Waylon Nixon in a car that was stuck in traffic. Mr. Morse decided to stop the car and to see if he could persuade Waylon Nixon and Lorenzo Hayden to resolve the matter between them. As he began to get out of his car, his gun was unloaded, in a zippered bag near his feet. He did not touch the gun. However, Mr. Morse did not know that Mr. Hayden had a gun with him. When Mr. Hayden saw Mr. Nixon, Mr. Hayden jumped out with his gun. Mr. Nixon in turn got out of his car with his gun, shot first, and hit Mr. Hayden in the head, killing him. Mr. Morse's gun never left the zippered bag.

Mr. Morse was charged in state court with conspiracy to commit murder, attempted murder and use of a firearm in the commission of attempted murder. Months later, he was also

indicted on the instant federal charges. In January, 2004, Mr. Morse was acquitted on all charges in state court.

Mr. Morse filed a Motion to Dismiss, preserving certain constitutional and statutory interpretation issues. Mr. Morse entered a plea of not guilty that was treated as a conditional guilty plea. Judge Moon denied the Motion to Dismiss, and Mr. Morse was found guilty of two counts of violating 18 U.S.C. §922(g)(9). On September 30, 2003, Judge Moon imposed a sentence of 18 months' incarceration. Mr. Morse appealed to the Fourth Circuit Court of Appeals, which had jurisdiction by authority of 28 U.S.C. §1291, which provides for jurisdiction over a final judgment of a United States District Court.

SUMMARY OF REASONS TO GRANT CERTIORARI

Tim Morse was convicted of a "crime of domestic violence" two years before the statute was enacted that made it unlawful for him to possess a firearm, and no procedure exists to inform people like Mr. Morse that it is now a federal felony for him to possess a firearm. Yet case law decided under 18 U.S.C. §922(g)(9) makes clear that no notice or knowledge is required by the statute – a due process problem. There is no aspect of this case that "substantially affects" interstate commerce, which was Congress' rationale for turning a state court domestic relations issue into a federal crime. Overall, under many different theories, we ask the Court to find the statute unconstitutional.

Even if the Court does not find the statute unconstitutional, we ask that the Court reverse and remand for resentencing after the Court hands down its expected opinion in the cases now pending that will decide the validity of the United States Sentencing Guidelines. United States .v. Booker, 04-104 (cert. granted August 3, 2004); United States v. Fanfan, 04-105 (cert. granted August 3, 2004).

ARGUMENT

I

APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED BY LACK OF ADEQUATE NOTICE OF THE PROHIBITIONS OF 18 U.S.C. §922(g)(9).

In Liparota v. United States, 471 U.S. 419 (1985), this Court construed the food stamp fraud statute, 7 U.S.C. §2024(b), to require that the defendant know that his actions are illegal. The Court stated, "This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." 471 U.S. at 426. In Staples v. United States, 511 U.S. 600 (1994), this Court applied the logic of Liparota to require that the government that a defendant knew that the weapon that he possessed was a "machine gun." The Court looked to factors such as the "expectations that individuals may legitimately have in dealing with the regulated items."

In this case, following the logic of Liparota and Staples, this Court should hold that 18 U.S.C. §922(g)(9) requires that the government prove that the defendant knew that he was

prohibited from carrying a firearm before he can be convicted of a violation of the statute.

The Fourth Circuit, following its earlier precedent in U.S. v. Mitchell, 209 F.3d 319, 323-324 (4th Cir. 2000) and other cases, rejected the due process challenge.

A. Tim Morse Had No Notice That He Was Not Permitted To Possess a Firearm.

It is uncontradicted that Timothy Morse did not know, and had not been given notice, that his 1994 misdemeanor domestic violence conviction would prohibit him, starting with the passage of the Lautenberg Amendment in 1996,[1] from exercising his constitutionally protected right to possess a firearm.[2]

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[1] §922(g)(9) was enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, effective September 30, 1996.

[2] The Second Amendment to the United States Constitution gives to Timothy Morse the right to possess a firearm

B. In Virginia, as in Most States, No Procedure Exists to Give Notice To Those Who Have Been Convicted of a Misdemeanor Involving Domestic Violence That They May Not Possess a Firearm.

The Judicial Conference of the United States suggests that at every felony guilty plea in federal courts, the District Court ask a litany of questions to assure that the defendant is pleading guilty knowingly, voluntarily and intelligently. The District Court will ask some variant of "Do you realize that if you are found guilty, you will now be prohibited from possessing a firearm?" And after the defendant has been found guilty, the Court will in all likelihood advise the defendant that he is now prohibited from possessing a firearm. At sentencing, he is told by the District Judge upon his release from prison, he must live in a home free from firearms or other destructive devices. Similar colloquies take place in state courts. It is virtually inconceivable that someone could be found guilty of a felony in the United States and not have been told that he or she may not now possess a firearm.

Similarly, at least in Virginia, if a person has been the subject of a domestic restraining order, the restraining order itself states that the defendant may not possess a firearm while the restraining order is in effect.

However, to this day, at least in Virginia, if a person is convicted of a misdemeanor crime of domestic violence, there is no procedure for notifying him that he cannot carry a

firearm.[3] And there certainly is no procedure for notifying a person who has in the past been convicted of a misdemeanor involving domestic violence that he cannot now carry a firearm.

C. The Failure To Notify a Person Who Has Been Convicted of a Misdemeanor Involving Domestic Violence That He May No Longer Exercise His Constitutionally Protected Right To Possess A Firearm Violates Due Process.

The due process notice challenge can be looked at in either of two ways, which are essentially two sides of the same coin – either the statute is unconstitutional on its face for failing to require either actual knowledge or valid notice of the proscriptions of the statute, or the government may not, consistent with the Constitution, apply the statute to convict Morse of a criminal offense without a showing that he had either actual knowledge or valid notice.

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[3] The usual questions during felony guilty pleas in state and federal court with respect to forfeiture of rights including the specific right to possess firearms appear nowhere in misdemeanor warrants. Misdemeanants do not receive the notice included on the written form protective orders published by the Commonwealth of Virginia, and it is not common practice for defendants in the General District Court or Juvenile & Domestic Relations District Court to be advised about these future prohibitions when pleading guilty to misdemeanor offenses. No counterpart to the felony colloquy or protective orders exists or is used, in practice, when misdemeanor guilty pleas are made or someone is adjudicated "guilty" of such an offense.

This issue is controlled by the logic of this Court's decision in Staples v. United States, 511 U.S. 600 (1994). In that case, this Court held that if the government intends to punish a defendant for possessing a "machine gun," the government must prove that the defendant knew that the weapon that he was possessing had the essential characteristics of a machine gun. The statute in question – 26 U.S.C. §5861(d) – did not have an express mens rea requirement, and could be read to be essentially a "strict liability" offense. The theory behind allowing prosecutions for "strict liability" offenses is that the activity in question is so inherently dangerous that the defendant should have known that there was a "probability of strict regulation," and so it is not unreasonable to require a defendant to learn enough about the law that he is able to conform his conduct to its requirements.

In Staples, this Court held that possession of a firearm is so commonplace, 511 U.S. at 619-620, that it does not alert individuals to the likelihood of regulation. Nothing has changed in the ten years since Staples was decided. It is still legal for most people to possess a firearm. Possession of a firearm is still commonplace. It is still protected under the Second Amendment to the Constitution. As one commentator has noted, as the scope of the criminal law has expanded, "the principle that ignorance of the law is no excuse, long thought to be basic to criminal law, is no longer appropriate when criminal law applies in surprising ways to otherwise ordinary behavior." Grace, Note, "Ignorance of the Law as an Excuse," 86 Colum. L. Rev. 1392, 1392-93 (1986).

Over the years, this Court has held that there are at least some times when ignorance of the law may be an excuse to a criminal statute:

- Food stamp fraud – Liparota, supra.
- Tax fraud – Cheek v. United States, 498 U.S. 192 (1991).
- Money laundering – Ratzlaf v. United States, 510 U.S. 135 (1994).
- Possession of a machine gun – Staples, supra.

As this Court explained in Cheek:

> Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law...
>
> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws.

498 U.S. at 199-200. The Court went on to explain that because of the complexity of the tax laws and the difficulty in knowing exactly what is permitted and what is proscribed, the government may prosecute tax fraud when it can show "a

voluntary, intentional violation of a known legal duty." Id., quoting United States v. Bishop, 412 U.S. 346, 360 (1973).

This notion that the criminal law should punish only intentional violations of a "known legal duty" also underpins this Court's due process "void-for-vagueness" jurisprudence. In Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), the Court outlined the theory:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

There is an assumption in the law that everyone knows and understands what the laws prohibit. In an era when the Virginia Code takes up two bookshelves, the U.S. Code Annotated takes up 12 bookshelves, and the case law construing them take up rooms, that assumption is truly a legal fiction. In the words of Mr. Bumble, "If the law assumes that, the law is a ass." C. Dickens, Oliver Twist, Chapter LI.

The concern that legislatures are passing laws that criminalize behavior that the ordinary person might not recognize as criminal is even the subject of comic strip humor. In the comic strip Herman, printed in newspapers on May 29,

2004, a defendant appears before the judge, who explains that he is charged with "five counts or whistling whilst waiting for a bus and two counts of chewing gum in a public elevator." Asked how he pleads, the defendant responds, "I'm new in town." The judge responds, "Ignorance of the law is no excuse."

Herman could well be describing the situation in which Virginia Lambert found herself in Los Angeles in the mid-1950's. She did not know that if she, as a convicted felon, moved to Los Angeles, she had to register with the Chief of Police. Lambert v. California, 355 U.S. 225, 228 (1957). This Court held that the ordinance that required registration violated due process.

> We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."

355 U.S. at 229.

And in Screws v. United States, 325 U.S. 91, 93 (1945), this Court condemned the practice of the Roman emperor Caligula, who would have new laws printed in fine print and posted in a dark corner of the Roman Forum – thereby

technically complying with the law but in fact making it very difficult for anyone to know what the law demands.

We do not ask the Court to hold that the federal government may not under any circumstances limit the rights of individuals to possess firearms; we only ask the Court to hold that the federal government may not criminally punish someone who exercises a constitutionally protected right unless that person has received knowledge that he has lost that right.[4]

As a practical matter, such a ruling would mean that those who were convicted of crimes involving domestic violence before the passage of the Lautenberg Amendment in 1996 would have to be notified that their constitutionally protected right to carry a firearm has been abrogated before they can be convicted of a felony and imprisoned for up to 10 years. For Mr. Morse, this prosecution has served as notice to him, and he is henceforth on notice that possession of any firearm or ammunition will expose him to federal prosecution and imprisonment.

With our exploding proliferation of criminal statutes, more and more laws are criminalizing "otherwise ordinary behavior" in ways that are not apparent to many ordinary citizens. Long gone are the days when the distinction between malum in se and malum prohibitum was all the analysis that was necessary. Fading fast are the days when the separate

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[4] Nor need the Court address another, different, question – whether the government must prove that notice has been given to those who are convicted of a crime involving domestic violence after the passage of the Lautenberg Amendment in 1997.

category of "public welfare" offenses made any real sense. We ask this Court to grant review in this case, to help define for legislatures and for courts the limits, hinted at in Liparato, Staples and Ratzlaf, to the legislative power to create new offenses that the ordinary person would not realize were crimes. In particular, we ask this Court to require that if the legislature is going to create offenses that the ordinary person would not realize are crimes, some notice be required.

II

THIS COURT SHOULD DECLARE THE UNITED STATES SENTENCING GUIDELINES UNCONSTITUTIONAL AS ABROGATING DEFENDANT'S RIGHT TO HAVE A JURY DETERMINE ALL RELEVANT ASPECTS OF HIS SENTENCE.

This Court has accepted two cases – United States .v. Booker, 04-104 (cert. granted August 3, 2004); United States v. Fanfan, 04-105 (cert. granted August 3, 2004) – for review. The primary question presented in those cases is whether the United States Sentencing Guidelines are constitutional in light of this Court's rulings such as Blakely v. Washington, 2004 WL 1402697 (June 24, 2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000).

In this case, we did not make an objection to the Sentencing Guidelines at trial or on appeal to the Fourth Circuit. However, if the Sentencing Guidelines are declared unconstitutional under the authority of Apprendi and other

cases, this Court should reverse and remand for reconsideration, and perhaps resentencing, in light of the decision in those cases.

If this Court were to follow the logic of courts such as the District Court in Utah in U.S. v. Croxford, No. 2:02-CR-00302PGC (June 29, 2004), and to rule that the Sentencing Guidelines as a whole are unconstitutional, and that it is not possible under the current framework to uphold sentences of cases still not yet final, Tim Morse's sentence would be invalid, and the case would have to be remanded for resentencing, even if the Court did not sustain Morse's constitutional objections to 18 U.S.C. §922(g)(9).

If the Court does not grant review on the constitutionality objections to the statute, we ask the Court to hold this case until decision in Booker and Fanfan and to remand for further consideration in light of those opinions.

III

18 U.S.C. §922(g)(9) IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESS' POWER TO REGULATE INTERSTATE COMMERCE.

The enactment of 18 U.S.C. §922(g)(9), which prohibits "persons convicted in any court of a misdemeanor crime of domestic violence, to possess in or affecting commerce, any firearm or ammunition," cannot in fact be justified by the Commerce Clause. It is a criminal statute that has nothing to do with any kind of economic activity "substantially

affect[ing]" interstate commerce – the test articulated in U.S. v. Lopez, 514 U.S. 549 (1995). The recitation of a jurisdictional element in the language of the statute is insufficient to save it, because the "minimal nexus" standard of Scarborough v. U.S., 431 U.S. 563 (1977), has been effectively overruled by this Court's later decisions in Lopez, supra, U.S. v. Morrison, 529 U.S. 598 (2000), and U.S. v. Jones, 529 U.S. 848 (2000). The Scarborough threshold for establishing the minimal nexus was that "the firearm has been, at some time, in interstate commerce." That standard simply cannot be reconciled with the "substantially affects" analysis in Lopez and must no longer be applied by the federal courts.

A. Federal Firearms Prohibitions Cannot Be Founded on the Commerce Clause, Unless the Prohibited Activity "Substantially Affects" Interstate Commerce, a "Minimal Nexus" Being Insufficient Basis for Federal Legislation in an Area Traditionally Left to the States.

U.S. v. Lopez, 514 U.S. 549 (1995), defines the standard by which the constitutionality of Congressional enactments by authority of the Commerce Clause is to be measured. The decision establishes the three broad categories of activity that Congress may regulate under its commerce power: (1) Congress may regulate the use of the channels of interstate commerce, to keep them free from immoral and injurious uses; (2) Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may

come only from intrastate activities; and (3) Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. Lopez at 558-559.

18 U.S.C. §922(q) fell into the third category: "a regulation of an activity that substantially affects interstate commerce." Id. Section 922(g)(9) would likewise appear to fall into the third Lopez category, since the intrastate possession of a firearm does not obviously affect the channels or the instrumentalities of interstate commerce, and the statute does not require the defendant or the firearm to be engaged in an interstate commercial activity at the time of arrest. Indeed, at least one Circuit has explicitly held just this. See, e.g., U.S. v. Pierson, 139 F.3d 501, 503 (5th Cir. 1998) ("[T]he intrastate possession of a firearm could only be prohibited under the Commerce Clause if such possession had a substantial effect on interstate commerce."). All of the Circuits, whether or not they have explicitly categorized §922(g) using a Lopez analysis, seem to have implicitly considered the statute as part of this third category's exercise of Congress' commerce power.

Lopez struck down the Gun-Free School Zones Act of 1990, prohibiting any individual from knowingly possessing a firearm at a place that he knew was a school zone, 18 U.S.C. §922(q), holding that it exceeded Congressional powers under the Commerce Clause. Specifically, Lopez held that: (1) the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce; (2) 18

U.S.C. §922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined and is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated, and cannot be sustained as a regulation of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affect interstate commerce; and (3) subsection (q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question affects interstate commerce. Lopez at 561-562.

Lopez further removed ambiguity in the existing case law as to whether an activity must merely "affect" (no matter how indirectly) or "substantially affect" interstate commerce, deciding in favor of a stricter standard that preserved the federal-state relationship:

> Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. [Citations omitted.] We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Lopez at 559.

B. 18 U.S.C. §922(g)(9) Is Not an Essential Part of a Larger Regulation of Economic Activity in Which the Regulatory Scheme Could Be Undercut Unless the Intrastate Activity Were Regulated.

18 U.S.C. §922(g)(9), like §922(q), is not an essential part of a larger regulation of economic activity. 18 U.S.C. §922(g)(9) is a criminal statute, intended to keep firearms out of the hands of persons convicted of misdemeanor crimes of domestic violence. The rationale for regulating convicted felons is more obvious. These more serious offenders predictably violate terms of probation, go across state lines and obtain firearms to commit other crimes. However, as with possession of a firearm near a school zone, Congress lacked any logic to support a finding that someone convicted of a domestic assault misdemeanor posed any particular threat that the states did not already or could not effectively regulate without federal interference.

Tim Morse has lived in Virginia all his life. His domestic assault misdemeanor occurred in Virginia. His firearm was lawfully purchased by his friend James Brock, and was accidentally left at Morse's house. Morse's possession of the weapon had no impact on interstate commerce and was conduct more properly regulated by Virginia. This statute, therefore, cannot be sustained under cases upholding regulations of activities that arise out of or are connected with

a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

C. The Jurisdictional Element in 18 U.S.C. §922(g)(9) Fails to Establish the Required Nexus with Interstate Commerce.

Unlike the school zone legislation invalidated by Lopez, §922(g)(9) does contain an express jurisdictional element requiring proof that the defendant "possess[es] in or affecting commerce, any firearm or ammunition." Appellant asserts that the inclusion of a jurisdictional element of §922(g)(9) does not by itself establish that possession of firearms by persons convicted of misdemeanor domestic violence has an explicit connection with or substantial effect on interstate commerce. Standing alone, this statutory recitation is not sufficient to save this statute from a Commerce Clause challenge.

The federal Courts of Appeals have consistently upheld the constitutionality of §922(g), relying on the mere recitation in the statute of the jurisdictional element, without more, to meet the "minimal nexus" test articulated in Scarborough v. U.S., 431 U.S. 563 (1977), that a firearm at one point traveled in interstate commerce is sufficient to satisfy the required nexus between possession and commerce.

The courts have examined 18 U.S.C. §922(g) for the presence of the words "interstate commerce" and, finding them, have declared Lopez inapplicable and the exercise of Commerce Clause authority sound. The difficulty with this interpretation is that it gives such language a talismanic significance, obviating the need to analyze the exercise of

Commerce Clause authority to "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce," Lopez at 561, and that it is limited to a "discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce (emphasis added)." Lopez at 562. Although this Court, in Lopez, noted that the statute in question there did not contain a jurisdictional element, it did not discuss the scope and effect of such a requirement because it was enough in that case to note that the statute in question there contained no such element. But the rest of Lopez makes it clear that the conduct prohibited by a statute must have a substantial effect on some economic activity of interstate commerce. Furthermore, Lopez never analyzed further whether, in that particular case, there was such a substantial effect, because this additional inquiry was unnecessary. Lopez at 562.

U.S. v. Morrison, 529 U.S. 598 (2000), striking down the Violence Against Women Act as beyond legislative power under the Commerce Clause, further refined the role of the jurisdictional element: "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce," 529 U.S. at 612 (emphasis added), and "Lopez makes clear that such a jurisdictional element would lend support to the argument that [42 U.S.C.] § 13981 [the Violence Against Women Act of 1994] is sufficiently tied to interstate commerce,..." id. at 613 (emphasis added). The Supreme Court's clear intention is that the presence of a jurisdictional element in the language of the statute is not determinative by itself.

Consequently, the "minimal nexus" standard articulated in Scarborough cannot survive the "substantially affects" test established by Lopez and the limitations set by Morrison on the significance of the jurisdictional element.

Scarborough held that there was "no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." 431 U.S. at 575.

> Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. Indeed, it was a close question in Bass whether § 1202(a) even required proof of any nexus at all in individual cases. The only reason we concluded it did was because it was not "plainly and unmistakably" clear that it did not. 404 U.S., at 348. But there is no question that Congress intended no more than a minimal nexus requirement.

Scarborough at 577.

Scarborough was not expressly overruled by Lopez, Morrison, and Jones, but this Court recognized that

> [t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our

> prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. Gibbons v. Ogden, supra, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. Jones & Laughlin Steel, supra, at 30. This we are unwilling to do.

Lopez at 567-568. It is precisely the too broadly inclusive reach of Scarborough's "minimal nexus" standard that Lopez intended to curb, in order to ensure that Commerce Clause legislation was aimed at activity substantially affecting interstate commerce.

While Scarborough has not been overruled, this Court has not cited Scarborough since 1985, ten years before the Lopez decision,[5] clearly suggesting that Scarborough no longer defines the Commerce Clause test. The absence of citations to Scarborough gains yet more significance, considering the constitutional challenges successfully brought in Lopez, Morrison, and Jones, reviewing Commerce Clause challenges

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[5] With the exception of U.S. v. Morrison, in which Scarborough was cited in a dissenting opinion.

to 18 U.S.C. §922 and other federal legislation. Scarborough has not been cited even to distinguish its result from other decisions where a federal statute was not constitutionally authorized by the Commerce Clause.

In fact, 18 U.S.C. §922(g)(9) had not even been enacted at the time Scarborough was decided, and it is part of the broad expansion of firearms prohibitions enacted into §922 since then. It is not clear whether this Court would have applied the same "minimal nexus" analysis to a §922(g)(9) case if mere possession of a firearm by a person convicted of misdemeanor domestic violence had been the subject of the proceeding, rather than the "felon-in-possession" prohibition. Misdemeanor domestic violence is so quintessentially a state concern that this Court may well have concluded, had the issue been presented, that §922(g)(9) did not present even a "minimal nexus" standard. The concern in Lopez that the logic of Scarborough threatens to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," Lopez at 567, is even more compelling a concern in a case such as this.

We ask this Court to grant review on this matter to reconcile Scarborough and Lopez, and to make clear the boundaries of Congress' Commerce Clause power.

IV

18 U.S.C. §922(g)(9) VIOLATES THE NINTH AND THE TENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Congress violated the Tenth Amendment to the United States Constitution when it invaded state sovereignty to criminalize lawful possession of firearms after misdemeanor convictions for domestic violence.

In the Eastern District of Virginia, under "Project Exile," cases that could be prosecuted in state court were prosecuted federally instead, and the widespread publicity and advertisement for this program put potential violators on notice that their illegal possession of firearms would be so prosecuted. U.S. v. Nathan, 202 F.3d 230 (4th Cir. 2000). No such federal-state program accompanied the prosecution of misdemeanor domestic violence offenders, such as Petitioner, in the Western District of Virginia.

Virginia's legislative and regulatory scheme for prohibiting possession of firearms by certain classes of individuals is comprehensive. The choice whether to prohibit certain classes of persons from possessing firearms and how severely to punish them is a deliberate one that must be left to an exercise of the police powers traditionally reserved to state legislatures under the Ninth and Tenth Amendments.

The fact that 95% of all firearms within all states have been imported from another state suggests that the federal

penalty under § 922(g)(9) functions merely to enhance penalties for violations of state law without actual proof that such proscribed conduct substantially affects interstate commerce.[6] Further, possession offenses dominate the federal caseload, with 65% of all §922 defendants being prosecuted under subsection (g), indicating a diversion of federal resources away from cases that logically have far greater impact on interstate commerce than do possessions by domestic violence misdemeanants that do not substantially affect commerce.

Domestic relations is an area that is uniquely a matter for state courts rather than federal courts. While there may be circumstances where a domestic relations problem has a true federal impact, there is no conceivable impact on interstate commerce under §922(g)(9), and under these facts.

Congress violated the 10th Amendment to the United States Constitution when it invaded state sovereignty to criminalize lawful possession of firearms after misdemeanor convictions for domestic violence, without advisement that possession of a previously legal firearm might lead to federal felony prosecution. Printz v. U.S., 521 U.S. 898 (1997) (Brady

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[6] "During a recent federal prosecution under 18 U.S.C. §922(g) in Houston, Texas, the Government's own expert witness on firearm manufacturing and distribution admitted that approximately 95 percent of all firearms in the United States—with all fifty states considered 'in the aggregate'—have been imported into the state [in which they are present] across the state line[s]." Newton, Brent, Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez, 3 J. APP. PRAC. & PROCESS 671, 681-682 (2001).

law obligating states to conduct background checks on prospective handgun purchasers imposes unconstitutional obligation on state officers to execute federal laws although federal regulation of handgun purchases was permitted by the Commerce Clause). This Court rejected the argument that "[t]he power to regulate the sale of handguns under the Commerce Clause, coupled with the power to 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,' Art. I, §8, conclusively establishes the Brady Act's constitutional validity." Printz, 521 U.S. at 923-924.

Although Virginia has statutes prohibiting possession of firearms by convicted felons[7] and persons subject to the authority of still active protective orders[8], there is no counterpart state law prohibiting firearm possession by persons after conviction for domestic violence misdemeanors. Furthermore, there is no notice, advertising or publicity whatsoever to inform such persons that their subsequent possession of firearms purchased lawfully before such misdemeanor convictions will constitute a federal felony in this area where the state sovereign did not regulate the conduct although it had authority to do so.

Virginia's legislative and regulatory scheme for prohibiting possession of firearms by certain classes of individuals is comprehensive. The choice whether to prohibit

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[7] Va. Code Ann. §18.2-308.2.

[8] Va. Code Ann. §18.2-308.1:4.

certain classes of persons from possessing firearms and how severely to punish them is a deliberate one that must be left to an exercise of the police powers traditionally reserved to state legislatures under the Ninth and Tenth Amendments.

We ask this Court to grant review to determine whether Congress has again overstepped its bounds under the Ninth and Tenth Amendment.

V

18 U.S.C. §922(g)(9) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Under the federal scheme of 18 U.S.C. §921, there is an exception for people who have had their right to carry a firearm restored by further action, either by the Court or by the Governor. The statute contains a specific reference to having one's right to carry a firearm restored after it had been taken away by being convicted of a felony; there is a specific reference to having one's right to carry a firearm restored after that right had been taken away by being convicted of certain misdemeanors. Virginia has no procedure for having one's right to carry a firearm restored, because there is no procedure in Virginia for taking away that right in the first place.

In fact, Virginia has a crazy quilt of firearms regulations; §18.2-308.2 bars felons from possessing a

firearm[9]; §18.2-308.1:1 prohibits those who have been adjudged not guilty by reason of insanity from possessing a firearm[10]; §18.2-308.1:2 prohibits firearm possession by those who have been adjudged legally incompetent or mentally incapacitated, and refers to a statutory procedure to have one's rights restored; §18.2-308.1:3 provides that someone who has been involuntarily committed may not possess a firearm during the time of the involuntary commitment, though obviously that person would have the right to use a firearm again upon release from confinement; §18.2-308.1:4 is the equivalent of 18 U.S.C. §922(g)(8), in that it prohibits someone under a protective order from possessing a firearm during the time that the order is in effect; and §18.2-308.1:5 prohibits someone who has been convicted of two misdemeanor marijuana offenses within a 36-month period from possessing a firearm for five years, and provides for how the restriction may be allowed to expire.

The entire scheme is arbitrary and capricious along two different axes.

First, across state lines – a South Carolina misdemeanant may have the ability to get the right to possess a firearm restored, because there is a procedure for doing so; a

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[9] There is a procedure for restoration of the rights of a felon to carry a firearm. ART. V, §12 of the Virginia Constitution.

[10] §18.2-308.1:1 expressly gives an NGRI acquittee the right to petition the Court for permission to carry a firearm.

Virginia misdemeanant cannot, because there is no such procedure.

Second, within a state but across different misdemeanors – a Virginia marijuana misdemeanant may be able to have his or her rights restored, but not a Virginia "domestic assault" misdemeanant.

The basic difficulty of the scheme of the Lautenberg Amendment is that it assumes certain common aspects among the criminal justice system of our 50 states – assumptions that are false. The result of the fallacious underlying assumptions is that the statute treats similarly situated people differently, for reasons that bear no rational relation to a legitimate state end.

It is important to remember that the Second Amendment provides that Mr. Morse has a constitutional right to possess a firearm. That right is being abridged by Congress. Before Congress abridges that right, it must have a compelling state interest to do so. There is no compelling state interest in prohibiting Virginia misdemeanants, but not South Carolina residents, from possessing a firearm. Indeed, there is not even a rational relationship between the regulations (or statutes) and a legitimate state end.

We ask the Court to grant review on this issue, and to strike down the federal statute as violating Mr. Morse's rights to equal protection of the laws, and to substantive due process.

CONCLUSION

For the foregoing reasons, Appellant Timothy Morse respectfully requests this Court to grant certiorari, to declare 18 U.S.C. §922(g)(9) unconstitutional, at least as applied to him, and to dismiss the case. In the alternative, if the Court does not grant that relief, we ask that the Court hold this case for consideration in light of the pending cases of U.S. v. Booker and U.S. v. Fanfan, and to remand for further consideration in light of the decisions reached in those cases.

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No._____

In The Supreme Court of the United States

TIMOTHY DARYL MORSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 03-4810

TIMOTHY DARYL MORSE,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
Norman K. Moon, District Judge.
(CR-02-66)

Submitted: April 28, 2004
Decided: May 18, 2004

Before WIDENER and TRAXLER, Circuit Judges,
and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

J. Lloyd Snook, III, SNOOK & HAUGHEY, P.C., Charlottesville, Virginia, for Appellant. John L. Brownlee, United States Attorney, William F. Gould, Assistant United States Attorney, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

See Local Rule 36(c).

OPINION

PER CURIAM:

Timothy Daryl Morse made a conditional guilty plea to two counts of possessing a firearm or ammunition after being convicted of a "misdemeanor crime of domestic violence" in violation of 18 U.S.C. § 922(g)(9) (2000). On appeal, Morse alleges that: (1) the district court erred in finding that his prior Virginia conviction for assault and battery against a family or household member under Va. Code Ann. § 18.2-57.2 (Michie 1996) was a predicate "misdemeanor crime of domestic violence" and (2) the district court erred in overruling his motion to dismiss on the grounds that § 922(g)(9), as applied to him, violates: (a) his right to notice that it was illegal for him to possess a firearm or ammunition, (b) the Commerce Clause, (c) the Tenth Amendment, and (d) the Equal Protection Clause of the Fourteenth Amendment. For the reasons that follow, we affirm.

We find that Morse's conviction for assault and battery against a family or household member was properly considered a predicate crime for his § 922(g)(9) conviction. We note that Morse cohabited with the victim of his crime and thus would be considered a "family or household member" under Virginia law. *See* Va. Code Ann. §§ 16.1-228, 18.2-57.2. The facts reveal that Morse struck the victim in the face after she informed him that she was leaving him for another man. Morse's Virginia conviction and his conduct both meet the definition of a "misdemeanor crime of domestic violence" as set forth in 18 U.S.C. § 921(a)(33)(A) (2000).

This court has rejected the argument that § 922(g)(9) is invalid because of notice concerns under the Fifth Amendment. *United States v. Mitchell*, 209 F.3d 319, 323-24 (4th Cir. 2000). Likewise, this court has found that § 922(g) is a valid exercise of Congress' power under the Commerce Clause. *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001). We find that Morse has failed to show that § 922(g)(9) violates the Tenth Amendment. *See United States v. Bostic*, 168 F.3d 718, 723-24 (4th Cir. 1999) (rejecting a Tenth Amendment challenge to 18 U.S.C. § 922(g)(8)). Finally, Morse provides no authority for his equal protection claim. Other circuits have rejected this claim. *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002); *United States v. Hancock*, 231 F.3d 557, 565-67 (9th Cir. 2000); *United States v. Lewitzke*, 176 F.3d 1022, 1025-27 (7th Cir. 1999); *United States v. Smith*, 171 F.3d 617, 623-26 (8th Cir. 1999).

Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED